LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 23 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DUDLEY YOEDICKE
Whitney Building
New Orleans, La.

Counsel for Petitioner
Kalman Greenhill

LEON D. HUBERT, JR.
540 Oil & Gas Building
New Orleans, La.

Counsel for Petitioner
Frank Proctor, Jr.

February 23, 1963.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Petition for a Writ of Certiorari:

Opinions below 1

Jurisdiction 2

Questions presented 2

Statutory provisions involved 2

Statement of the case 3

Reasons for granting the writ 7

1. The conflict with the Morgan case 7

2. The conflicts with other appellate decisions 14

Conclusion 18

Appendix 1a

CITATIONS

CASES:

Berger v. United States, 295 U.S. 78 ..... 3, 12, 13, 16

Commonwealth v. Kimble, 114 A. 2d 598, 187 Pa. Super. 490 17

Fowler v. United States, 310 F. 2d 66 (C.A. 5) 11, 16

Garrison v. United States, 154 F. 2d 106 (C.A. 5) ... 6, 8

Glasser v. United States, 315 U.S. 60 10

Greenhill v. United States, 298 F. 2d 405 (C.A. 5) .. 3, 12

Harrison v. United States, 191 F. 2d 874 (C.A. 5) ... 10

Poole v. United States, 250 F. 2d 396 (App. D.C.) ... 17

Remmer v. United States, 347 U.S. 227 14

Stansbury v. United States, 219 F. 2d 165 (C.A. 5) 10, 15, 16

State v. Thomas, 264 P. 1017, 38 Wyo. 72 17

Stephens v. United States, 289 F. 2d 308 (C.A. 5) 4, 10, 15, 16

Strang v. United States, 53 F. 2d 820 (C.A. 5) 6, 8

Taylor v. Alabama, 335 U.S. 252 ..... 6, 8

United States v. Morgan, 346 U.S. 502 ..... 7, 8, 9, 14

United States v. Taylor, 303 F. 2d 165 (C.A. 4) 17

Wiswell v. State, 173 P. 662, 14 Okl. Cr. 517 17

Young v. United States, 138 F. 2d 838 (C.A. 5) 6, 8

STATUTES AND RULES: Page

All-Writs Statute, 28 U.S.C. § 1651(a) 7
Court Reporter Act, 28 U.S.C. § 753(b) .....2, et seq.
28 U.S.C. § 2255 .....9, 17, 18
Federal Rules of Criminal Procedure:
Rule 33 9
Rule 52 .....15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 4, 1963.

OPINIONS BELOW

The per curiam order of the Court of Appeals, accompanied by the concurring statement of Judge Rives, has not been reported. A copy of the order and the concurring statement appears in the appendix hereto. A copy of the unreported order of the District Court for the Northern District of Alabama, dated December 7, 1962, is also reprinted in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1963. On January 30, 1963, the Chief Justice of the United States signed an order extending the time in which to file this petition for a writ of certiorari to and including February 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is contrary to the proper administration of federal criminal justice to deny criminal defendants a hearing and determination of a coram nobis petition, seeking a new trial on the basis of a conceded violation of the Court Reporter Act, simply because the violation had not been discovered and raised in the original proceedings before the District Court or the Court of Appeals.

2. Whether a conceded violation of the Court Reporter Act, whereby the prosecutor's summation to the jury was not recorded so as to make possible the discovery and correction of plain errors committed therein, constitutes reversible error warranting a new trial.

STATUTORY PROVISIONS INVOLVED

The Court Reporter Act, 62 Stat. 922, 28 U.S.C. § 753(b):

> "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the ap-

proval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding."

STATEMENT OF THE CASE

The relevant facts in this case can be summarized as follows:

1. Petitioners were convicted, after a jury trial in the United States District Court for the Northern District of Alabama, of mail fraud and use of the mails in the fraudulent sale of securities in violation of 15 U.S.C. § 77q(a) and 18 U.S.C. § 1341. Motions for new trial were denied and prison sentences were imposed.

2. The convictions were affirmed on appeal to the Court of Appeals for the Fifth Circuit. 298 F. 2d 405. That court held, *inter alia*, that petitioners had received a fair trial despite claims that the trial had been conducted in an atmosphere of hostility and prejudice. More specifically, the court stated that it had "carefully reviewed this record" and concluded that there was "no reasonable basis for the claim that the prosecutor was too vigorous within the rule of *Berger* v. *United States*, 295 U.S. 78." 298 F. 2d at 411.

3. On October 8, 1962, this Court denied a petition for a writ of certiorari which sought review of the holding that the alleged atmosphere of hostility and prejudice did not preclude a fair trial. 371 U.S. 830; No. 145, Oct. Term 1962.

4. Simultaneously, this Court denied petitioners' motion to vacate and remand the proceedings in light of the admitted fact that the court reporter had failed to record or transcribe the prosecutor's argument to

the jury. 371 U.S. 830. That motion raised for the first time in the proceedings the court reporter's failure in this respect, a failure which was in direct violation of the mandatory provisions of the Court Reporter Act, 62 Stat. 922, 28 U.S.C. § 753(b), and which made it impossible for any court to notice and correct any plain error involved in any unduly hostile or prejudicial remarks made to the jury by the prosecutor. Accompanying the motion was an affidavit by the reporter conceding that he had not recorded any portion of the final argument "because it was his custom not to take down any such arguments" and that there had been no agreement by counsel to the effect that such arguments should not be recorded. The reporter further conceded, in an affidavit submitted by the Government, that he had not recorded the summations but stated that he had been present during the oral arguments for purposes of noting any objections and rulings thereon and that no such objections had been made. Affidavits were also submitted by the petitioners and their trial counsel attesting to the fact that the prosecutor's final argument had been replete with prejudicial remarks that served to inflame the hostility surrounding the trial. Reference was made in the motion to various lower court decisions, particularly *Stephens* v. *United States*, 289 F. 2d 308 (C.A. 5), holding that such a statutory violation by a court reporter in and of itself constituted reversible error requiring a new trial.

5. The Government, in opposing the motion to vacate and remand, conceded the failure of the court reporter to record the final arguments. No effort was made to counter the allegations that the prosecutor had indeed made inflammatory remarks in his summation. The opposition was premised solely on the proposition that

the objection to the reporter's violation of the statute came too late in the proceedings. To that proposition the petitioners replied that the defect had only recently been uncovered and that it was too fundamental, too destructive of the appeal process, to permit it to be overlooked, particularly on a direct appeal from a conviction.

6. Since this Court's denial of the motion to vacate and remand was without comment and hence without prejudice to renewing the contention in the lower courts, petitioners on October 15, 1962, sought leave to file a second petition for rehearing in the Court of Appeals based upon the reporter's failure to obey the dictate of the Court Reporter Act. On November 26, 1962, the Court of Appeals granted leave to file the second petition and thereupon denied it without comment.

7. Thereafter the petitioners filed in the United States District Court for the Northern District of Alabama, the trial court, petitions "in the nature of a writ of error coram nobis for new trial." These petitions restated the history of the proceedings and alleged that the statutory violation by the court reporter had infected the fairness of the appellate process by virtue of the inability of the higher courts to correct any plain error committed by the prosecutor in his summation. The petitions requested that (1) the judgment and sentence of the District Court be vacated and the petitioners granted a new trial and (2) the court stay the force and effect of the Court of Appeals mandate until the ultimate determination of the coram nobis petitions.

8. On December 7, 1962, the District Court entered an order (reprinted in the appendix hereto) continuing

a hearing on the coram nobis petitions pending a ruling by the Court of Appeals with respect to granting the District Court permission to hold such a hearing. The court stated its opinion that "in view of the fact that the Court of Appeals has affirmed the judgment of conviction, the petitions should have been in the first instance presented to that Court," citing *Strang* v. *United States*, 53 F. 2d 820 (C.A. 5), *Young* v. *United States*, 138 F. 2d 838 (C.A. 5), *Garrison* v. *United States*, 154 F. 2d 106 (C.A. 5), and *Taylor* v. *Alabama*, 335 U.S. 252, 261.

9. In light of the District Court's order, petitioners filed in the Court of Appeals a petition seeking the grant of permission to the District Court to entertain and hear the coram nobis petitions. Alternatively, petitioners sought leave to file in the Court of Appeals the coram nobis petitions. The Government filed an opposition, asserting that this Court by its action in denying the motion to vacate and remand (371 U.S. 830) had ruled adversely as to the relief sought in the coram nobis petitions and that this ruling "is now the law of the case and is binding on this Court and the United States District Court."

10. On January 4, 1963, the Court of Appeals entered a per curiam order (reprinted in the appendix hereto) denying both the petition for the grant of permission to the District Court to entertain and hear the coram nobis petitions and the application for leave to file the coram nobis petitions in the Court of Appeals. Circuit Judge Rives, concurring specially, wrote that there seemed to him "no good reason for petitioners' failure to object at the trial to the non-recording of the oral arguments and to the claimed prejudicial arguments when made, or for their failure to supplement the

record on motion for new trial, in either of which events the objections now raised could have been fully presented on their appeal." He concluded "that no sufficient need appears for the extraordinary remedy of a writ of coram nobis."

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has completely frustrated petitioners' efforts to challenge by coram nobis the conceded violation of the Court Reporter Act and the resulting obstruction of their appeal rights. In so doing, the Court of Appeals has rendered a decision in direct conflict with this Court's ruling in *United States* v. *Morgan*, 346 U.S. 502, and with determinations of other federal appellate tribunals.

The decision below necessarily involves important and basic questions about the fair and even-handed administration of criminal justice in the lower federal courts. Indeed, the contrast between the treatment accorded these petitioners and that accorded others who have made identical challenges concerning violations of the Court Reporter Act is so sharp as to indicate a most egregious and unfair discrimination against these petitioners. The supervisory power of this Court must be invoked if this intolerable situation is to be corrected.

1. The Conflict With the Morgan Case

In *United States* v. *Morgan*, 346 U.S. 502, 512, this Court held not only that the coram nobis remedy is still available in federal courts by virtue of the All-Writs Statute, 28 U.S.C. § 1651(a), but that where the conditions for pursuing that remedy have been satisfied a motion in the nature of the extraordinary writ of

coram nobis "must be heard by the federal trial court." Otherwise, said this Court, "a wrong may stand uncorrected which the available remedy would right."

There is not the slightest indication in the *Morgan* decision that permission is required from a court of appeals in order for a federal trial court to hold a hearing or make any determination of the merits of a coram nobis petition. Nor is there any basis for implying from that decision that an appellate court may, as a matter of discretion, preclude a trial court from processing such a motion. The *Morgan* ruling is simple and unambiguous—where such a motion is appropriate, it *must* be heard by the federal trial court.

In this case, however, both the trial court and the appellate court have assumed and held that appellate permission is always requisite to the consideration of the coram nobis petition.[1] The Court of Appeals ruled that it would not permit the filing or consideration of such a petition either in the District Court or in the Court of Appeals. This ruling is completely inconsistent with the *Morgan* decision, which in literal effect commands federal trial courts to entertain and resolve coram nobis petitions wherever such procedure is appropriate in order "to achieve justice."

---

[1] The District Court relied upon *Strang* v. *United States*, 53 F. 2d 820, *Young* v. *United States*, 138 F. 2d 838, and *Garrison* v. *United States*, 154 F. 2d 106, all Fifth Circuit opinions indicating that to the extent that coram nobis was still available such a remedy could be pursued only with the permission of the appellate court. But all those decisions antedated the *Morgan* decision of this Court and can no longer be considered pertinent. The other case cited by the District Court, *Taylor* v. *Alabama*, 335 U.S. 252, 261, related to requirements of Alabama procedure and has no bearing on federal court remedies.

There can be no question of the propriety of the coram nobis remedy in the instant proceeding. The *Morgan* decision, 346 U.S. at 512, indicated three requisites to the availability of this remedy:

(1) The inability of determining from the record the merits of the claimed error. In the *Morgan* case the plain error related to the alleged improper waiving of counsel. Here, the plain error relates to the hostility and prejudice alleged to have occurred in the prosecutor's summation. In neither situation did the trial record itself permit a determination. And in the instant case the record defect is concededly and solely due to the court reporter's violation of the Court Reporter Act.

(2) The unavailability of other remedies. At this juncture, no remedy other than coram nobis appears available to these petitioners. The *Morgan* decision makes plain, 346 U.S. at 510-511, that the provisions of 28 U.S.C. § 2255, applicable only to prisoners "in custody", does not preclude coram nobis on behalf of those not presently in custody.[2] And the possibility that petitioners might be able to raise the issue on a motion for new trial, within the scope of Rule 33, Fed. Rules Crim. Proc., seems dubious in light of the limitation of Rule 33 confining such motions based on grounds other than newly discovered evidence to the period "with 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."[3]

---

[2] Petitioners have continued free on bail pending resolution of the instant problem.

[3] Timely motions for a new trial, filed under Rule 33, had been overruled. Those motions did not raise the issue as to the Court

(3) Sound reasons must exist for failure to seek appropriate earlier relief. Here such reasons do in fact exist. The failure to seek relief any earlier than was done in the direct appeal proceedings simply reflects the difficulty inherent in uncovering a violation of the Court Reporter Act at the trial court stage, a violation that normally is not noticeable or rectifiable until the appellate process is well under way.

During the trial, petitioners had a right to assume that the reporter was fully complying with the absolute dictates of the Court Reporter Act, dictates which the Fifth Circuit itself has described as "mandatory" and as incapable of being waived.[4] No reason thus existed during the heat of trial, particularly at the point of final summations, why petitioners or their counsel should check whether the reporter was continuing to perform his statutory duty of transcribing all the proceedings. If there was any obligation to check, it lay with the trial judge rather than with the petitioners or any attorney. And if this statutory duty

---

Reporter Act violation, a matter not then known to the petitioners or their counsel.

But even if another new trial motion could be made under Rule 33, the error of the court below would only be aggravated. The petition sought to be pressed in the courts below was labeled one "in the nature of a writ of error coram nobis for new trial." Since federal procedure is concerned more with substance than technical labels, this petition could be considered a motion for a new trial in the interest of justice. So considered, however, the motion would obviously have to be entertained and resolved. Rule 33 in no way conditions the filing or consideration of such a motion on the permission of an appellate court, even after affirmance has been had of the conviction. *Harrison* v. *United States*, 191 F. 2d 874, 875-876 (C.A. 5); and see *Glasser* v. *United States*, 315 U.S. 60, 87.

[4] See *Stephens* v. *United States*, 289 F. 2d 308, 309 (C.A. 5), and *Stansbury* v. *United States*, 219 F. 2d 165, 169, n. 6 (C.A. 5).

"cannot be waived" by agreement of the parties, as the Fifth Circuit held in *Stansbury* v. *United States*, 219 F. 2d 165, 169, n. 6, it would be perverse justice to hold that such a duty and its violation could be waived by virtue of an understandable failure to detect it on the spot.[5] Not until after the trial, when the record of the proceedings had been prepared for appeal purposes, would such a defect normally become apparent.

Moreover, the reporter's statutory violation rendered meaningless for appeal purposes any objection that might have been made to the alleged improper and prejudicial remarks of the prosecutor. The failure to record such remarks prior to making the objection would make it impossible for an appellate court to weigh the force of the objection in the light of what was actually said. As was stated in *Fowler* v. *United States*, 310 F. 2d 66, 67 (C.A. 5), where an objection had been made and ruled upon during the course of an unrecorded summation by a prosecutor and where the judge had instructed the jury to disregard the alleged prejudicial remarks, "The requirement [of the Court Reporter Act] is mandatory and without a transcript of the argument of counsel we are unable to determine whether the United States Attorney made such prejudicial comment as to require reversal."

So completely destructive of appeal rights is such a failure to observe the mandate of the Court Reporter

---

[5] Even had the failure been noticed at some time during the summation, an objection at that point would not necessarily have corrected the damage. All that was said to the jury before the objection, including what was possibly prejudicial, would have been unrecorded and incapable of accurate reconstruction. In truth, no amount of objection can cure a reporter's failure to record any appreciable portion of the trial proceedings.

Act, making it impossible for an appellate court to weigh properly any objections that were made or any plain errors that might have occurred, that it should be considered and corrected once the failure comes to light subsequent to the trial. Fairness in the administration of criminal justice far outweighs any understandable neglect in discovering the fatal defect at the earliest conceivable moment.

The seriousness of the violation of the Court Reporter Act, treading as it does upon the efficacy of the appellate process, is dramatically illustrated by this case. And, most importantly, the impact of the violation is such as to remove from petitioners sole responsibility for not having earlier discovered and challenged the violation. Thus in affirming petitioners' convictions and in adjudicating the contention that the prosecutor had overstepped the proper bounds of his function, the Court of Appeals ruled (*Greenhill* v. *United States*, 298 F. 2d 405, 411):

> "As to other errors assigned, *we have carefully reviewed this record* and conclude that appellants had their day in court. They were fairly tried. . . . *There is no reasonable basis for the claim that the prosecutor was too vigorous within the rule of Berger* v. *United States*, 295 U.S. 78. The government was as entitled to an advocate as appellants." [Emphasis added.]

The court thus indicated that it had "carefully reviewed this record" and found that the rule in the *Berger* case had not been violated. But the court was reviewing a record which—due to the reporter's dereliction of duty—did not contain the prosecutor's summation. And the court attempted to satisfy itself that the *Berger* rule—a rule which requires that an appel-

late court actually read the prosecutor's argument"—had not been violated. The impossibility of so doing is self-evident. And the failure of the Court of Appeals to note the absence of the prosecutor's summation in the record which it was carefully reviewing is certainly no less significant than the petitioners' failure at that stage.

Finally, the action of this Court in denying the prior motion to vacate and remand, a motion premised on the conceded violation of the Court Reporter Act, cannot properly be taken as a ruling on the merits of that motion or as foreclosing consideration of a proper coram nobis petition in the trial court. Like the denial of certiorari, the denial of a motion without comment by this Court cannot be taken as a resolution of the merits of the motion. It may have been denied for any one or more of a number of reasons, including a feeling that the matter could more appropriately be resolved in the trial court in a manner permitting the development of a full record as to surrounding circumstances. And since the motion to vacate and remand presented no question as to the propriety or availability of a coram nobis petition in the trial court, this Court's action is not res judicata or the law of the case in that respect.[7]

---

[6] In the *Berger* case, 295 U.S. at 85, which dealt with a prosecutor's misconduct in his summation as well as in examination of witnesses, this Court stated:

> "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury. *A reading of the entire argument is necessary to an appreciation of these objectionable features.*" [Emphasis added.]

[7] By the same token, the denial of the second petition for rehearing by the Court of Appeals, following the denial by this

In these circumstances, the applicability of the *Morgan* ruling is plain. Coram nobis is the only remedy now available to petitioners if justice is to be achieved as the *Morgan* opinion promised. By their coram nobis petition, they merely sought an opportunity to have a hearing and a determination as to whether the convictions should stand in light of the conceded violation of the Court Reporter Act. That is the historic function of a coram nobis petition. That is the meaning of the *Morgan* decision. The failure of the court below to follow the *Morgan* decision and accord petitioners an opportunity for a day in court merits review and reversal by this Court. See *Rummer* v. *United States*, 347 U.S. 227, 230.

2. The Conflicts With Other Appellate Decisions

The decision of the court below, in refusing to recognize the serious impact of the Court Reporter Act violation on the basic appeal rights of the petitioners, is at war with all recorded appellate decisions dealing with such violations. Every such decision has recognized the mandatory nature of the Act, the frustration of appeal rights resulting from a violation of the Act, and the necessity of reversing a conviction and directing a new trial in order to vindicate the fair administration of criminal justice in this context. The refusal of the court below to follow such rulings or to apply such principles, in the course of refusing petitioners permission even to seek relief through coram nobis, merits the full attention of this Court.

Court of the motion to vacate and remand, cannot be construed as a ruling on the propriety or availability of a coram nobis proceeding. Like this Court's action, the denial of rehearing by the Court of Appeals was without comment and thus without prejudice to pursuing whatever other remedies might be available to petitioners.

Ironically, most of the appellate case law dealing with violations of the mandates of the Court Reporter Act has come from the Fifth Circuit, acting through different panels than involved in the instant proceeding (Judges Rives, Cameron and Bell). In three highly pertinent decisions, the Court of Appeals for the Fifth Circuit has determined:

(1) That the requirement of the Court Reporter Act respecting verbatim recording of all proceedings in criminal cases had in open court "cannot be waived since there must be a specific agreement to waive reporting in other cases.[8] The requirement that all open court proceedings in criminal cases be reported was designed to prevent disputes and questions of veracity all too common under the old system." *Stansbury* v. *United States*, 219 F. 2d 165, 169, n. 6 (Judges Holmes, Tuttle and Allred).

(2) That the failure of a court reporter to record the examination of veniremen and the arguments of counsel to the jury creates a situation where "we do not see how we can, under Rule 52(a), F.R.Cr.P., 18 U.S.C.A., adjudicate that there was no showing that any errors which might have been reflected by the transcript were harmless." The Court Reporter Act being "mandatory in its requirements," the court held that the judgment of conviction must accordingly be reversed and a new trial had. *Stephens* v. *United States*, 289 F. 2d 308, 309 (Judges Cameron, Brown and Hannay).

---

[8] The Court Reporter Acts states categorically with respect to criminal proceedings that all such proceedings in open court shall be recorded. Proceedings "in other cases" must also be recorded "unless the parties with the approval of the judge shall specifically agree to the contrary." Such a waiver or agreement is thus impossible in a criminal case.

(3) That the failure of a court reporter to record the summation of the United States Attorney made it impossible "to determine whether the United States Attorney made such prejudicial comment as to require reversal." Such impossibility existed despite the fact that the record did show an objection to the alleged prejudicial comment and an instruction to the jury to disregard such comment. Once again the direction of the Court Reporter Act was held to be "mandatory" with respect to transcribing final arguments, and any local practice to the contrary was said to be overridden by the Act. And because the failure to record the summation made it impossible to determine the extent of the alleged prejudice flowing from the prosecutor's comment, the conviction was reversed and a new trial ordered. *Fowler* v. *United States*, 310 F. 2d 66, 67 (Judges Jones, Bell and Carswell).

Fair application of the *Stansbury*, *Stephens* and *Fowler* decisions of the Fifth Circuit to the conceded facts of this case would clearly lead to a reversal of petitioners' convictions and the grant of a new trial. The failure to record the prosecutor's summation made it impossible for an appellate court to determine whether the rule in the *Berger* case was satisfied or whether the summation contained plain or harmless error within the meaning of Rule 52, as the *Stephens* case recognized; even had petitioners registered an objection to the prosecutor's comments when made, the failure to record those comments rendered the appeal meaningless, as the *Fowler* case held. The reporter's duty to record was so "mandatory" and non-waivable, as the *Stansbury* and *Fowler* cases held, that the drastic remedy of reversing and ordering a new trial is the only just way of correcting so vital a defect.[9]

---

[9] State courts have generally recognized that a new trial is the only appropriate way of correcting a failure to record necessary portions of a criminal trial, including the prosecutor's summation.

The failure of the court below to accord petitioners the benefit of its own rulings in these three cases in itself raises serious questions as to the proper and even-handed administration of justice. Petitioners, the innocent victims of a completely unauthorized and illegal practice of a court reporter, should be entitled to seek and to obtain appropriate relief in light of the *Stansbury*, *Stephens* and *Fowler* precedents of the Fifth Circuit. Criminal justice demands at the least equal opportunity to challenge and correct manifest defects in criminal procedure.

But more than the failure of the court below to follow its own controlling precedents is the conflict between the decision in this case and that of other circuit courts respecting the point at which violations of the Court Reporter Act may be raised. Both the Court of Appeals for the Fourth Circuit (*United States* v. *Taylor*, 303 F. 2d 165, 169) and the Court of Appeals for the District of Columbia Circuit (*Poole* v. *United States*, 250 F. 2d 396, 399) have, in the course of collateral appeals under 28 U.S.C. § 2255, considered previously unchallenged violations of the Court Reporter Act and taken appropriate action in light thereof.[10] Consider-

See *Wiswell* v. *State*, 173 P. 662, 14 Okl. Cr. 517; *Commonwealth* v. *Kimble*, 144 A. 2d 598, 187 Pa. Super. 490; *State* v. *Thomas*, 264 P. 1017, 38 Wyo. 72.

[10] In the *Taylor* case, the Fourth Circuit made plain that it was not holding that the failure to record a portion of a criminal trial "is of itself an error that can be raised by a motion to vacate sentence under § 2255 but we are of the opinion that it is a matter which may be considered in a collateral proceeding in determining whether a defendant is entitled to a hearing on a motion to vacate sentence and in determining whether the sentence should be vacated." 303 F. 2d at 169. In the instant case, petitioners also seek consideration of the reporter's statutory violation in determining whether a coram nobis hearing is appropriate and whether the convictions should be reversed. Here the efficacy of the appellate process, as well as the violation of the Court Reporter Act, is under consideration.

ation of this type of violation in subsequent § 2255 proceedings, even though not raised earlier, leads inescapably to the conclusion that such a violation can and should be considered by the courts below at the present juncture of this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment below reversed with directions to permit petitioners a hearing on their coram nobis petitions. Elemental standards of criminal justice, as well as the necessity for vindicating the command of Congress in the Court Reporter Act, so dictate. Should this Court feel, however, that mandamus is more appropriate than certiorari to deal with the erroneous denial of permission by the Court of Appeals, petitioners have filed simultaneously herewith a conditional motion for leave to file a petition for a writ of mandamus.

Respectfully submitted.

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DUDLEY YOEDICKE
Whitney Building
New Orleans, La.

Counsel for Petitioner
Kalman Greenhill

LEON D. HUBERT, JR.
540 Oil & Gas Building
New Orleans, La.
Counsel for Petitioner
Frank Proctor, Jr.

February 23, 1963.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,439

KALMAN GREENHILL, FRANK PROCTOR, JR., also known as FRANCIS E. PROCTOR, *Appellants*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal From the United States District Court for the Northern District of Alabama

(January 4, 1963)

Before RIVES, CAMERON, and BELL, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition to this court for permission to be granted to the United States District Court for the Northern District of Alabama, Southern Division, to entertain and hear the petition of appellants in the nature of writ of error coram nobis for new trial be, and the same is hereby DENIED.

IT IS FURTHER ORDERED that the petition for leave to file petitions in this court on behalf of appellants in the nature of writ of error coram nobis for a new trial be and the same is hereby DENIED.

RIVES, Circuit Judge, concurring specially:

For ought that appears, the petitioners and their counsel knew that the court reporter was not taking down or recording the oral arguments of counsel at the time of such failure, but did not object. It affirmatively appears that the court reporter was present during the entire oral argu-

ments of counsel for the purpose of noting objections by either party, but no objections were made. The claimed grossly erroneous and prejudicial arguments now relied on were certainly fresh in the minds and memories of petitioners and their counsel following the jury's verdict, but the petitioners in their motions for new trial failed to assert them as a basis for relief. It seems to me that there was no good reason for petitioners' failure to object at the trial to the non-recording of the oral arguments and to the claimed prejudicial arguments when made, or for their failure to supplement the record on motion for new trial, in either of which events the objections now raised could have been fully presented on their appeal. It follows, I think, that no sufficient need appears for the extraordinary remedy of a writ of coram nobis.

I therefore concur specially.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

Case No. 14592 Criminal Action

UNITED STATES OF AMERICA

v.

KALMAN GREENHILL and FRANK PROCTOR, JR., et al.,
Defendants

Order

This cause came on for hearing at this time upon the petitions of defendants, Kalman Greenhill and Frank Proctor, Jr., for a writ of error coram nobis; and upon consideration thereof, the Court is of the opinion, in view of the fact that the Court of Appeals has affirmed the judgment of conviction, the petitions should have been in the first instance presented to that Court. *Strang* v. *United*

States, 53 F. 2d 820; *Young* v. *United States*, 138 F. 2d 838; *Garrison* v. *United States*, 154 F. 2d 106; and *Taylor* v. *Alabama*, 335 U.S. 252, 261. The Court is, therefore, of the opinion that the orders of December 3 and December 5, 1962, copies of which are annexed to said petitions, should be vacated and the hearing upon the petitions should be continued pending a ruling of the Court of Appeals in respect to the granting of such permission.

It is, therefore, ORDERED, ADJUDGED and DECREED that the orders of December 3 and December 5, 1962, hereinabove referred to, be and the same are hereby vacated, and a hearing upon the petitions be and the same are hereby continued.

Done and Ordered, this the 7 day of December, 1962.

H. H. GROOMS
District Judge

INDEX

	Page
Statement	1
Argument	4
Conclusion	7

CITATIONS

Cases:	
Chereton v. *United States*, 309 F. 2d 197, No. 780, this Term	7
Stephens v. *United States*, 289 F. 2d 308	3
Strang v. *United States*, 53 F. 2d 821	6
Sunal v. *Large*, 332 U.S. 174	5
United States v. *Morgan*, 346 U.S. 502	5, 6
Statute and rule:	
28 U.S.C. 2255	5
Rule 52, F.R. Crim. P	3

678646—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 1100 Misc.

KALMAN GREENHILL AND FRANK PROCTOR, JR., PETITIONERS

v.

RICHARD T. RIVES, BEN F. CAMERON AND GRIFFIN B. BELL, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION FOR LEAVE TO FILE A PETITION FOR MANDAMUS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioners were convicted, after a jury trial in the United States District Court for the Northern District of Alabama, for mail fraud and use of the mails in the

fraudulent sale of securities. Greenhill was sentenced to imprisonment for three years and Proctor to imprisonment for two years. The convictions were affirmed on appeal, 298 F. 2d 405, and a petition for a writ of certiorari was denied by this Court, 371 U.S. 830.

After the petition for a writ of certiorari was filed but before action thereon, petitioners filed in this Court a motion to vacate the judgment and remand the cause to the district court for a new trial, or to the court of appeals for reconsideration, on the ground that the arguments of counsel had not been recorded by the court reporter. They annexed to their motion an affidavit by the court reporter to the effect that, in accordance with the then usual practice in his district, he did not record the arguments of counsel. Petitioners' Motion to Vacate and Remand, No. 145, this Term, pp. 1a–2a. In opposing the motion, the government appended affidavits of the reporter and deputy clerk stating that the reporter was present in the courtroom during the arguments of counsel for the purpose of noting objections by either side and any ruling which the court might render thereon, and that no such objection was made. Memorandum for the United States in Opposition to Motion to Vacate and Remand, pp. 5–6. The government pointed out that, although petitioners were appellants in the courts below and responsible for presenting to that court the record on which they wished the cause to be judged, no issue as to the reporter's failure to record the argument of counsel had been raised in their motion for a new trial, or on appeal, or in their

petition for certiorari, even though petitioners' brief in the court of appeals had been filed after the decision of the Fifth Circuit in *Stephens* v. *United States*, 289 F. 2d 308, holding it reversible error for the court reporter to fail to record, *inter alia*, the arguments of counsel to the jury, *Id.*, pp. 1–3. The government argued that in view of the absence of objection at the trial to the argument of counsel, in view of the failure to raise any issue with respect thereto on appeal, and in the light of the overwhelming evidence against petitioners, the attempt to claim plain error under Rule 52, F.R. Crim. P., was unconvincing. *Id.*, pp. 3–4 On October 8, 1962, this Court denied the motion to vacate and remand, as well as the petition for a writ of certiorari. 371 U.S. 830.

On October 15, 1962, petitioners sought leave to file a second petition for rehearing in the court of appeals, based upon the reporter's failure to record the arguments of counsel. This motion was denied on November 26, 1962 (Pet. 5).

Petitioners then filed in the district court a petition in the nature of a writ of error *coram nobis* for a new trial, alleging that the failure of the reporter to record the arguments of counsel infected the fairness of the appellate process because the appellate court would be unable to correct any plain error by the prosecutor. The district court determined that it could not hear the matter until and unless the court of appeals granted permission for the filing of the application (Pet. App. 2a–3a). Petitioners then applied to the court of appeals for permission to file the motion in the district court or in the court of appeals. Leave

was denied on January 4, 1963 (Pet. 1a–2a). Petitioners seek review of that order by petition for a writ of certiorari (No. 859) or, in the alternative, they ask leave to file a petition for a writ of mandamus directing the court of appeals to grant permission to the district court to hear the application for writ of error *coram nobis* (No. 1100 Misc.).

ARGUMENT

Despite petitioners' attempt to label their various papers as applications for writs of error *coram nobis* their motions amount to no more than an attempt to reargue a point which they could have raised, but did not raise, on appeal in the court of appeals, which they did raise before this Court on their motion for remand, but which this Court did not consider of sufficient merit to warrant a remand of the cause; and which they again unsuccessfully raised before the court of appeals on their second motion for rehearing. Since petitioners' motion in the district court in effect sought to have the district court overrule the judgment of the court of appeals affirming the conviction and denying a second motion for rehearing, the district court properly refused to consider the matter without permission from the court of appeals. To do so would have been in violation of the mandate of the court of appeals. And the court of appeals properly declined to grant such permission, both because petitioners presented no valid ground for such relief and because petitioners were asking that court to grant relief which this Court had ruled was not a basis for a motion to remand the cause to that court or the district court.

Whatever the scope of the relief available under an application for a writ of error *coram nobis* and whatever the procedure to be followed, a matter we discuss below, these issues are not really presented by the facts of this case. Petitioners are merely attempting to relitigate matters which have been adjudicated against them.

1. As this Court indicated in its decision in *United States* v. *Morgan*, 346 U.S. 502, the writ of error *coram nobis* has been used infrequently in federal courts and its exact limits cannot be stated with precision. The effect of the *Morgan* decision, we believe, is to grant to one who is not in custody under the sentence attacked[1] a remedy for fundamental defects substantially equivalent to that which would be available to a prisoner in custody, formerly under habeas corpus and now by motion under 28 U.S.C. 2255. Relief available by way of *coram nobis* may be as broad as that under habeas corpus or 28 U.S.C. 2255, but it is certainly no broader. Neither the issue as to argument of counsel nor the question of the failure of the reporter to record the argument present matters cognizable under 28 U.S.C. 2255 or habeas corpus.[2] In *Sunal* v. *Large*, 332 U.S. 174, this Court held that a defendant who did not appeal from his

[1] It is questionable whether petitioners are in a position to resort to the remedy in view of the fact that the mandate in the criminal proceeding could be carried into effect immediately and petitioners would then be in custody under the judgment in the criminal case, which could be attacked collaterally only by a motion under 28 U.S.C. 2255.

[2] None of the cases cited by petitioners hold that the failure to record a portion of the trial is a ground for collateral attack on a judgment.

conviction could not by habeas corpus challenge the error of the trial court in declining to receive evidence which, under later decisions, might have constituted a defense to the charge. The claimed error here is much less serious and there is no excuse for not noticing it sooner. Indeed, the underlying complaint respecting the argument of government counsel could have been made at the trial, and the issue of the failure of the reporter to record the argument could have been raised on appeal. It was petitioners' responsibility to present to the court of appeals the record on which they wished the case to be judged. Had they wished to raise an issue as to arguments of counsel, they might have urged the failure to record them as a ground for new trial, as did the appellants in the cases cited by petitioners. In any event, having belatedly presented the question to this Court in their motion to remand and to the court of appeals in their second petition for rehearing, they cannot use *coram nobis* to relitigate the issue.

2. It is not entirely clear whether, after a conviction has been affirmed on appeal, permission to file a writ of error *coram nobis* should be obtained from the court of appeals before the district court may entertain such a motion. This was the rule at common law. See *Strang* v. *United States*, 53 F. 2d 820, 821 (C.A. 5). The *Morgan* decision does not settle the question since the judgment there under attack was entered on a plea of guilty from which no appeal had been taken. Perhaps, by considering *coram nobis* the equivalent of habeas corpus or 28 U.S.C. 2255, the opinion indicates that no permission would be necessary. The Sixth

Circuit so held in *Chereton* v. *United States,* presently pending before this Court in No. 780, this Term.[5] Nevertheless, in this case, where petitioners were making essentially the same contentions as had been made to this Court and the court of appeals, which had denied relief, the district court would seem to have been justified in deferring to the court of appeals. In any event, since the court of appeals has correctly held that the writ of error *coram nobis* does not lie in the premises, it is immaterial on what basis the district court reached the correct conclusion that there should be no hearing on petitioners' application.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari or for leave to file a petition for mandamus should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1963.

[5] The opinion of the court of appeals at 309 F. 2d 197, affirming the denial of the writ, shows merely that an application had been made to the court of appeals. Our files indicate, however, that the court ruled that permission from that court was not necessary. The issue raised by the application had not, however, as in this case, already been presented to the court of appeals.

U. S. GOVERNMENT PRINTING OFFICE: 1963

MAR 15 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Misc. No. 1100

KALMAN GREENHILL AND FRANK PROCTOR, JR., *Petitioners,*

v.

RICHARD T. RIVES, BEN F. CAMERON, and GRIFFIN B. BELL, Circuit Judges of the United States Court of Appeals for the Fifth Circuit, *Respondents.*

On Conditional Motion for Leave to File a Petition for a Writ of Mandamus and Petition for a Writ of Mandamus

PETITIONERS' SUPPLEMENTAL BRIEF

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DUDLEY YOEDICKE
Whitney Building
New Orleans, La.

Counsel for Petitioner Kalman Greenhill

LEON D. HUBERT, JR.
540 Oil & Gas Building
New Orleans, La.

Counsel for Petitioner Frank Proctor, Jr.

March 15, 1963.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Misc. No. 1100

KALMAN GREENHILL AND FRANK PROCTOR, JR., *Petitioners,*

v.

RICHARD T. RIVES, BEN F. CAMERON, and GRIFFIN B. BELL, Circuit Judges of the United States Court of Appeals for the Fifth Circuit, *Respondents.*

On Conditional Motion for Leave to File a Petition for a Writ of Mandamus and Petition for a Writ of Mandamus

---

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this supplemental brief to call to the Court's attention two new and conflicting decisions:

(a) *Brown* v. *United States,* rendered by the Court of Appeals for the Ninth Circuit on February 18, 1963; and

(b) *Parrott* v. *United States*, decided by the Court of Appeals for the Tenth Circuit on February 8, 1963.

Those unreported decisions were unavailable to petitioners at the time of filing the certiorari petition and the mandamus motion on February 23, 1963. They are reprinted in full pertinent part in the Appendix hereto, *Brown* at p. 1a, *infra*, and *Parrott* at p. 8a, *infra*.

(a) The Brown Case

In recognizing the need for taking some corrective action in light of a conceded violation of the Court Reporter Act, the Ninth Circuit in *Brown* has rendered a decision contrary to that of the Fifth Circuit in the instant proceeding in several respects:

1. *Brown* holds that the minimum "appropriate procedure"—even where no error in the summation has been suggested—is to vacate the judgment of conviction and to remand for a hearing to determine whether the defendant was in fact prejudiced by the failure to record the final arguments. Development of the relevant facts, including a reconstruction of the summation to the extent possible, thereby permits a more meaningful resolution of the impact of the reporter's statutory violation.

But in the instant case, the Fifth Circuit has refused to permit such a hearing despite the uncontested allegations that prejudicial remarks were in fact made by the prosecutor in his unrecorded summation. The conflict between the two cases is heightened by the fact that the ingredient missing in *Brown*—the specification of error in the summation—is present in this case. The hearing required by *Brown* is thus all the more appropriate here.

2. In distinguishing the Fifth Circuit opinion in *Stephens* v. *United States*, 289 F. 2d 308, the Ninth Circuit in *Brown* notes that a new trial had been ordered in *Stephens* because the defendant there (who had not had counsel prior to the appeal) needed the unrecorded transcript in order to present "certain specified errors." The Ninth Circuit clearly implies that the drastic remedy of a new trial is justified where a specification of error has been made and where the absence of a record makes it impossible to fairly adjudicate that claim of error.* In these circumstances, a "denial of fundamental fairness" is created, requiring a new trial.

In addition, where the defendant has made allegations of serious error in the summation it is not likely that a mere hearing, without a new trial, will result in "a reasonably accurate estimate of the possibility of prejudice." The memories of the judge and opposing counsel may well differ, and no fair means exist to reconstruct what the prosecutor actually said. Hence, says *Stephens* as interpreted in *Brown*, a new trial becomes necessary.

But the important point is that *Brown* recognizes that something must be done where a violation of the Court Reporter Act has occurred. In failing to give such recognition, to the point of refusing even to permit the issue to be raised or a record developed, the decision below is directly in conflict with *Brown*.

---

* Petitioners in this case, of course, have made serious and unchallenged allegations that the prosecutor overstepped proper bounds in his summation. See affidavits on file with the Clerk of this Court, in connection with the prior motion to vacate and remand, No. 145, Oct. Term, 1962, reprinted in that motion.

(b) The Parrott Case

The Tenth Circuit in *Parrott*, in reliance upon the Fifth Circuit's decision in *Stephens*, ordered the drastic demedy of a new trial simply because the reporter had failed to record the voir dire examination, during which the trial judge had allegedly made an improper statement. The damage done by the failure was held to be irreparable. The absence of the relevant portion of the transcript made it impossible for the Tenth Circuit "to determine whether the errors [in the voir dire examination] were harmless and should be disregarded because of Rule 52(a), F.R. Crim. P." Hence the conviction could not stand.

Here again is a clear recognition of the appellate frustration inevitably created by a violation of the Court Reporter Act. That recognition is what the court below has steadfastly refused to give in this case, and that refusal has created a conflict with all recorded decisions on the matter, including the *Parrott* case.

The sum of all these other cases, moreover, indicates that there is a strong interest by the federal judiciary in maintaining the efficacy of the appeal process and in enforcing the absolute command of the Court Reporter Act. That interest is plainly sufficient enough to overcome any consideration stemming from petitioners' failure to detect and challenge the statutory violation at the earliest possible moment. Cf. *Glidden Company* v. *Zdanok*, 370 U.S. 530, 536.

It must also be noted that in this proceeding—far more so than in any other recorded case—the damage to the judicial process resulting from the reporter's dereliction of duty is openly obvious. The failure to record the summation has completely undermined the

determination of the court below that, having "carefully reviewed this record," there is "no reasonable basis for the claim that the prosecutor was too vigorous within the rule of *Berger* v. *United States*, 295 U.S. 78." 298 F. 2d at 411; see pp. 12-13 of petition for certiorari herein. Some form or avenue of relief must be accorded in order to restore the efficacy of the appellate process in this case.

Finally, to reiterate the uniqueness of the decision below in declining even to recognize an effort to cure so plain an error, the following comparative table of decisions is set forth, decisions which in one degree or another flatly contradict the ruling below:

	Court Reporter Act violation first raised in:	Effect of violation:	Relief:
Greenhill decision below	U. S. Supreme Court, on prior motion to vacate and remand.	Undermined efficacy of Ct. of Appeals opinion; nature of prosecutor's prejudicial comment has been alleged and not denied, and if allegations are true the judgment of conviction would be reversible	Denial of any hearing, let alone relief.
Brown decision of C.A. 9.	Court of Appeals.	Unknown. No allegation of error in summation.	Hearing to try to reconstruct summation and to determine any prejudice.
Parrott decision of C.A. 10.	After trial in the District Court.	Unrecorded voir dire examination made it impossible for Court of Appeals to determine whether alleged errors therein were harm.. under Rule 52.	New trial.
Fowler 310 F. 2d 66 (C.A. 5).	Court of Appeals.	Nature of prosecutor's possible prejudicial comment known, but without record cannot determine if reversal is required.	New trial.
Stephens 289 F. 2d 308 (C.A. 5).	Court of Appeals.	Made it impossible to adjudicate, under Rule 52(a), as to possible errors in prosecutor's summation and in examination of veniremen.	New trial.

	Court Reporter Act violation first raised in:	Effect of violation:	Relief:
Stansbury 219 F. 2d 165 (C.A. 5).	Court of Appeals.	Unrecorded bench conference, making a "supplemental record" necessary.	Reversed on merits of conviction.
Taylor 303 F. 2d 165 (C.A. 4).	Court of Appeals. in § 2255 proceeding.	Made it impossible to determine if sentence should be vacated.	Further hearing to determine what happened during unrecorded part of trial.
Poole 250 F. 2d 396 (App. D.C.).	Court of Appeals in § 2255 proceeding.	Unrecorded plea and imposition of sentence made it impossible to pass on § 2255 claim.	Court of Appeals ordered transcription and, on merits, vacated conviction.

CONCLUSION

For these various reasons, supplementing those expressed in the petition for a writ of certiorari, certiorari should issue in this proceeding or, alternatively, leave to file the petition for writ of mandamus should be granted and the writ thereupon issued.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DUDLEY YOEDICKE
Whitney Building
New Orleans, La.
Counsel for Petitioner Kalman Greenhill.

LEON D. HUBERT, JR.
540 Oil & Gas Building
New Orleans, La.
Counsel for Petitioner Frank Proctor, Jr.

March 15, 1963.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,782

Feb. 18, 1963

WILLIE FRANK BROWN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: POPE, BROWNING and DUNIWAY, Circuit Judges

BROWNING, Circuit Judge:

Appellant was convicted of transporting Betty Joyce Lanuzza from Seattle, Washington, to Richmond, California, for the purpose of prostitution in violation of 18 U.S.C.A. § 2421. He seeks reversal upon two grounds.

I

[Part I of the opinion, dealing with evidentiary matters, is not here pertinent and hence is omitted.]

II

Appellant asserts that the judgment must be reversed because the court reporter failed to record the closing arguments of counsel in violation of the statutory command that "all proceedings in criminal cases had in open court" be recorded verbatim. 28 U.S.C.A. § 753(b)(1). Appellant has not suggested any error that may have occurred in the prosecuting attorney's summation. The sole error specified is the failure to record the summations; this

error, appellant argues, in itself requires reversal and a new trial.[1]

We do not agree. In reviewing criminal convictions on appeal we are to disregard "error . . . which does not affect substantial rights." Rule 52(a), Fed. R. Crim. P. If the closing arguments of counsel contained no error affecting appellant's substantial rights, then failure to record those arguments would also be harmless error. Appellant argues that since the summations were not recorded we cannot be sure. But we are not compelled to set aside a valid conviction because of an error which may have been wholly harmless in order to be sure that we are not, through ignorance of the facts, denying relief for error which prejudiced appellant's substantial rights. The trial judge, the prosecuting attorney, appellant's trial counsel, the reporter, and the appellant himself are all available, as also,

---

[1] Appellant's argument would be without merit if presented in a collateral attack upon his conviction. Although the requirement of Section 753 (b)(1) that "all" proceedings in open court in criminal cases be recorded is mandatory (Stephens v. United States, 289 F. 2d 308, 309 (5th Cir. 1961)), we would think failure to record counsel's summation, without more, though error, "is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure" (Hill v. United States, 368 U.S. 424, 428 (1962)), and failure to record counsel's summation therefore would not, of itself, require the granting of collateral relief. However, if a denial of appellant's rights in some other respect were alleged, the absence of a record might be a significant factor in determining whether in all the circumstances there had been a denial of fundamental fairness. United States v. Taylor, 303 F. 2d 165, 169 (4th Cir. 1962). As the court held in *Taylor*, and as we indicated in Eddy v. United States, 256 F. 2d 78 (9th Cir. 1958), one possibility to be explored in a hearing on such a collateral attack would be whether a record sufficient to permit fair consideration of the alleged violations of defendant's rights could be reconstructed. Compare Macomber v. Gladden, 304 F. 2d 487, 490 (9th Cir. 1962).

no doubt, are other witnesses to what transpired. The appropriate procedure is to vacate the judgment and remand for a hearing to determine whether appellant was prejudiced by the error in failing to record the arguments. If the trial court concludes that he was, a new trial may be ordered. If the court concludes that he was not, a new final judgment may be entered. See *Remmer* v. *United States*, 347 U.S. 227 (1954). See also *Killian* v. *United States*, 368 U.S. 231, 241-44 (1961); *United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957); *Ogden* v. *United States*, 303 F. 2d 724, 737-38 (9th Cir. 1962).[2]

---

[2] As an appendix to its brief in this Court, the government submitted affidavits asserting that appellant's trial counsel did not object to the failure to record the closing arguments, nor to anything which the prosecutor said in his summation. If properly established, these facts would be relevant, for although plain error affecting substantial rights may be noticed despite defendant's failure to object (Rule 52(b), Fed. R. Crim. P.), "it is only where an error is seriously prejudicial that it will be noticed in the absence of objection." (Himmelfarb v. United States, 175 F. 2d 924, 950 (9th Cir. 1949)). "[P]ower to notice plain error not objected to will be exercised only to prevent a miscarriage of justice." (Schumacher v. United States, 216 F. 2d 780, 787 (8th Cir. 1954)). But they are not facts of record, and we may not consider them unless, and until, they are.

Judge Duniway's suggestion that the procedure outlined in Rule 75(n) of the Federal Rules of Civil Procedure was available to appellant by reason of Rule 39(b)(1) of the Federal Rules of Criminal Procedure is novel. It apparently did not occur either to appellant or to the government. Even if the suggested construction of the Rules were clearly correct, we think it would be inappropriate on direct appeal from a judgment of conviction in a criminal case to preclude review on the ground that appellant had conclusively waived error by failure to invoke so unfamiliar a remedy. The government has not contended for such a result. There is authority suggesting that even in a civil case, where the unreported portions of the record may be of substantial importance, the better practice is to remand under Rule 75(h) for supplementary proceedings so that the record "may conform to the truth," rather than to ignore error or attempt review on an incomplete record. See United States v. Chesapeake & O. Ry., 281 F. 2d 698, 701-02 (4th Cir. 1960).

Appellant argues that in *Stephens* v. *United States*, 289 F. 2d 308 (1961), the Court of Appeals for the Fifth Circuit adopted a rule which would require outright reversal in circumstances such as are presented here. We think *Stephens* is distinguishable. The court there stated that the defendant required the transcript of unrecorded proceedings to "properly present certain specified errors to this Court" (289 F. 2d at 309); in the present case, appellant has specified no error to which the closing arguments would be relevant. It also appears from the briefs and record in *Stephens* that defendant represented himself at trial; appointed counsel entered the case for the first time on appeal. This circumstance materially enhanced the likelihood that substantial error occurred in the unrecorded proceedings (which included the impaneling of the jury as well as closing arguments), and materially reduced the likelihood that a reasonably accurate estimate of the possibility of prejudice could be arrived at in a hearing if the case were remanded for that purpose.

Vacated and remanded for further proceedings.

POPE, Circuit Judge, concurring:

I concur fully in Judge Browning's opinion.

When, as here, there has been a complete disregard of a positive statutory command to record closing arguments, I find myself in a predicament. I do not want to order a new trial merely for want of this recording, in the absence of some proof of prejudice. And still, I know that if, in fact, government counsel made the kind of argument dealt with in Ginsberg v. United States, 5 cir., 257 F. 2d 950, 955, or in Wagner v. United States, 5 cir., 263 F. 2d 877, 884, I would seriously consider reversal for "plain error", whether objection was or was not made at the time. Compare Viereck v. United States, 318 U.S. 236, 248.

That any such thing happened is extremely unlikely, but but it is not impossible, as the cases cited show. Perhaps

the chances are only one in ten thousand, but since I believe that never, if we can possibly avoid it, should any man stand convicted where plain error occurs. I think we have taken here the only step that will make certain that appellant is assured a fair trial.

DUNIWAY, Circuit Judge, dissenting:

I dissent. I agree that the evidence is sufficient to support a finding that the woman was transported by the defendant, but I would not remand the matter for further proceedings relating to oral argument.

In *Irving* v. *United States*, 1931, 53 F. 2d 55, at 56, we said "that prejudice is not inferred from mere error, and that the burden is always upon an appellant to show that he has suffered damage in this case." To the same effect, *Didia* v. *United States*, 1939, 106 F. 2d 918, 920. There is a presumption that the District Court tried the case properly and that it protected the rights of the defendant, until the contrary is made to appear. This rule applies with particular force where it is claimed that there has been prejudicial misconduct in the argument of the prosecutor. *D'Aquino* v. *United States*, 1951, 192 F. 2d 338, 367.

Here, error does appear, in that the arguments of counsel were not taken down by the court reporter, but there is not even an assertion that if the argument had been taken down and brought before this court it would disclose any misconduct on the part of the prosecutor, or any other error, much less prejudicial misconduct or error. Furthermore, it would not be ground for reversal even if the prosecutor had been guilty of some misconduct in the course of his argument. There would also have to be objection, as this is the kind of error that is usually readily cured by admonition and instruction, if brought to the court's attention. It is also the type of error that is often deliberately waived by experienced counsel by failure to object, to avoid emphasizing the matter in the eyes of the jury. The miscon-

duct would have to be truly egregious to warrant reversal in the absence of objection.[1]

The rules of procedure provide a manner in which an appellant can bring before the court matters which occurred in the trial and of which no stenographic report was made. Rule 39(b) of the Federal Rules of Criminal Procedure provides that the rules and practice governing the preparation of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided. Rule 75(n) of the Federal Rules of Civil Procedure establishes a means for preparing a record when no stenographic report of the evidence or proceedings at a hearing or trial was made. This is comparable to the old bill of exceptions procedure, and an

---

[1] We note that, before oral argument, the court advised the jury as follows:

> "At this time, as the Court previously indicated, we are to hear the arguments of Counsel making comments on the evidence and the probative effect of the evidence, and Counsel in the case have a right to make those comments so long as they are reasonably supported by the state of the evidence. That is to say, if there is any evidence to reasonably back up what Counsel is commenting and arguing, then they are entitled to have the jury consider all such reasonable arguments. If, however, there should turn out to be a conflict between Counsel's recollection and the jury's recollection as to what the facts are as established by the evidence, it is for the jury to find the facts."

Also, in the course of its instructions, the court told the jury:

> "Statements, if any, by Counsel or the Court, unsupported by your own recollections of the evidence, you will disregard. Likewise, you will disregard all statements made by Counsel and the Court to each other during the trial.
>
> "In your deliberations and in reaching a verdict you should act only upon the evidence which has been admitted and the law as it has been given to you by the Court."

No exception was taken to the charge by defendant's counsel.

appellant has always had a duty, and the burden, of seeing that a proper record is brought before the Appellate Court. There has been no attempt to bring the matter before this court in the prescribed manner or to show any reason why this could not be done.

Under these circumstances, it is my view that the appeal should be terminated now, and that there is no point in remanding the matter for the purpose of trying to discover prejudicial error when it is presumed in the absence of an affirmative showing that no such error exists.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7069—January Term, 1963

CHARLES HARTWELL PARROTT, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the Eastern District of Oklahoma

(February 8, 1963)

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The appeal is from a judgment of fine and imprisonment entered on a jury verdict finding the appellant-defendant guilty of conspiracy to rob a bank insured by the Federal Deposit Insurance Corporation. The only point deserving consideration is the effect of a statement by the trial judge in the voir dire examination of prospective jurors that 3 other charges of bank robbery were pending against the defendant.

The voir dire examination was not recorded. After discovery of this fact, counsel for the defendant filed a motion to complete the record and supported that motion with affidavits. The official court reporter then wrote defense counsel saying:

> "I beg to advise that it is not the practice to take voir dire examination of the jury, consequently my notes of the trial do not contain Judge Rizley's statement to the jury."

The statute requires the recording of "all proceedings in criminal cases had in open court."[1] This provision is mandatory and the court has the duty to require compliance.[2] A local rule or practice cannot override a statute of the United States.

The government does not deny that in the voir dire the trial judge mentioned the other bank robbery cases pending in the same court against the defendant but argues that the error was harmless. The unavailability of a full transcript because of the undisputed failure of the court reporter to comply with the statute makes it impossible for us to determine whether the errors were harmless and should be disregarded because of Rule 52(a), F.R. Crim. P. The Fifth Circuit has reached the same conclusion in a similar situation.[3]

Reversed and remanded for a new trial.

---

[1] 28 U.S.C. § 753(b) provides in part: "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; * * *." The importance of recording the voir dire examination is shown by such cases as Consolidated Gas & Equipment Company of America v. Carver, 10 Cir., 257 F. 2d 111, 113-114, where a judgment was reversed because of a false answer on voir dire.

[2] Poole v. United States, D.C. Cir., 250 F. 2d 396, 399.

[3] Stephens v. United States, 5 Cir., 289 F. 2d 308, 309.

Office-Supreme Court, U.S.
FILED
MAY 10 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Misc. No. 1100

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

RICHARD T. RIVES, BEN F. CAMERON, AND GRIFFIN B. BELL, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,
Respondents.

On Conditional Motion for Leave to File a Petition for a Writ of Mandamus and Petition for a Writ of Mandamus

PETITION FOR REHEARING

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DUDLEY YOEDICKE
Whitney Building
New Orleans, Louisiana
Counsel for Petitioner Kalman Greenhill

LEON D. HUBERT, JR.
540 Oil & Gas Building
New Orleans, Louisiana
Counsel for Petitioner Frank Proctor, Jr.

May 10, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 859

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Misc. No. 1100

KALMAN GREENHILL AND FRANK PROCTOR, JR.,
Petitioners,

v.

RICHARD T. RIVES, BEN F. CAMERON, AND GRIFFIN B. BELL, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,
Respondents.

On Conditional Motion for Leave to File a Petition for a Writ of Mandamus and Petition for a Writ of Mandamus

---

PETITION FOR REHEARING

Petitioners file this petition for rehearing of the orders of this Court, entered on April 15, 1963, denying the petition for a writ of certiorari in No. 859 and

denying the motion for leave to file a petition for writ of mandamus in Misc. No. 1100.

This petition is premised upon two intervening circumstances within the meaning of Rule 58(2):

(1) This Court's grant of certiorari on April 29, 1963, in *Hardy* v. *United States*, Misc. No. 783 (now on the Appellate Docket as No. 1060). The question presented for review in that case is stated in the petition as follows:

> "Whether a stenographic transcript containing only 'the testimony and evidence presented by the Government' is a record of sufficient completeness to enable court-appointed counsel for an indigent convict to make an adequate investigation of possible grounds of appeal."

(2) The pendency before this Court of the petition for writ of certiorari (filed on March 14, 1963, subsequent to the instant matters) in *Strauss* v. *United States*, No. 928. The second question presented in that petition, which seeks review of a Fifth Circuit judgment, is stated as follows:

> "Whether or not the failure of the trial court to have the entire proceedings reported and furnish a copy of such report to a defendant in a criminal case is error per se, and is a denial of due process of law under the Fifth Amendment of the Constitution of the United States."

Both of the above cases, at least one of which will be fully canvassed by this Court, reflect the growing concern with flagrant violations of the appeal rights of criminal defendants, whether they be indigent or not. The failure to record part of the trial in violation of the Court Reporter Act or the refusal to pro-

vide counsel or a defendant with the full transcript is so destructive of the appellate process and of the right to prosecute a meaningful appeal that corrective action must be taken by this Court. The instant case presents a significant facet of that problem, coupled as it is with an unrebutted claim of reversible error in the unrecorded summation. This case should be considered simultaneously with the *Hardy* case and the *Strauss* case (should that be granted).

It may fairly be said that the principle here at stake, the right to a full record for appeal purposes, is an extension of the constitutional right to procedural due process. That principle needs implementation both here and in the *Hardy* case, for the very liberties of the petitioners are dependent thereon. Such implementation is a peculiarly appropriate exercise of this Court's power to supervise the administration of criminal justice in the federal courts. Equal justice in the law—including equal justice in the administration of the Court Reporter Act—demands that these petitioners, even though non-indigent, be accorded their due rights.

To the extent that the matter was not timely raised in the court below by petitioners' appellate counsel (who were not their trial counsel), petitioners submit that they themselves are without fault and should not be penalized for counsel's failure to detect the breakdown in the court reporting system at the earliest date possible. Cf. *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 633-634, 646-647. The responsibility in this respect must be shared by the appellate court below, which purported to review *all* the record when *all* the record was not before it. See petition for certiorari, pp. 12-13. In this context, as in the habeas corpus set-

ting in the recent opinion in *Sanders* v. *United States*, No. 202, April 29, 1963, "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."

For these reasons, the orders of April 15, 1963, should be vacated and a writ of certiorari issued or, alternatively, a writ of mandamus issued.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DUDLEY YOEDICKE
Whitney Building
New Orleans, Louisiana
Counsel for Petitioner
Kalman Greenhill

LEON D. HUBERT, JR.
540 Oil & Gas Building
New Orleans, Louisiana
Counsel for Petitioner
Frank Proctor, Jr.

May 10, 1963

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

Eugene Gressman